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SIIA

June 27, 2005

Mr. Donald C. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H-159
Washington, DC 20580

RE: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Secretary Clark:

On behalf of the members of the Software & Information Industry Association ("SIIA"), we submit our comments on the above-referenced Notice of Proposed Rulemaking ("Notice"), addressing a number of issues for which the Federal Trade Commission ("FTC") has discretionary authority to modify or prescribe rules under the CAN-SPAM Act ("Act").

As the principal trade association of the software code and information content industry, the more than 700 members of SIIA develop and market software and electronic content for business, education, consumers and the Internet. SIIA's members are software companies, ebusinesses, and information service companies, as well as many electronic commerce companies. Our membership consists of some of the largest and oldest technology enterprises in the world, as well as many smaller and newer companies.

Our members, as we have made clear throughout the FTC's process of implementation of the Act, will benefit from an enforcement and policy framework that is effective and consistent. As leaders in our industry, our members have an interest in combating fraudulent, deceptive and unwanted email communications, and believe that effective enforcement, especially at this early stage of implementation of the Act, will go far toward building confidence in the digital marketplace.

On the whole, we commend the FTC's implementation of the Act to date. Our comments on the issues outlined below seek to ensure that the FTC's approach is both effective and workable, while remaining consistent with the Act.

As a preliminary observation, SIIA urges the FTC to recall that the Act and this Rule will apply to a diversity of email recipients and senders. It will apply equally to consumer and business recipients receiving commercial email, regardless of whether the sender is a small,

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medium, large or non-profit enterprise. For our members, customers are as likely to be business enterprises as they are consumers in the home. The Act does not include features found in other related statutes that address these divergent interests (e.g., exempting business-to-business communications[1] or special treatment of existing business relationships[2]), and the Notice does not propose modifying in any way the transactional or relationship message exemption under the Act. These omissions, however, do not relieve the FTC from its obligation to take into account the fact that the Rule will apply to divergent and diverse sets of commercial email recipients, especially in light of the Act's inherent tensions and repeated inconsistencies in this regard.[3] Conversely, the absence of these provisions in the Act does not mean that the FTC must adopt a "one size fits all" approach – in particular, a model that only assumes traditional business-to-consumer email communications – in finalizing the Rule. Throughout our comments below, we point out the perils of assuming a traditional business-to-consumer model in developing the draft Rules. We appreciate the FTC's careful consideration of this fact as it reviews all the comments and formulates its final Rule.

PROHIBITION AGAINST FAILURE TO EFFECTUATE AN OPT-OUT REQUEST WITHIN THREE (3) BUSINESS DAYS OF RECEIPT

The current Rule, reflecting the standard in the Act when it was passed, prohibits a sender of emails from initiating transmission of commercial email more than ten (10) business days after receiving a recipient's opt-out request. A significant number of commentators last year urged that the period be extended, with virtually all of those arguing that this Rule should conform to the requirements of the Telemarketing Sales Rule ("TSR"), which provides for 31calendar days in which to implement an opt out.

We are deeply concerned that the FTC has instead suggested reducing the period to three (3) business days, stating that the period will "provide enhanced protection for email recipients'

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[1] Telemarketing Sales Rule, as amended, 16 C.F.R. 310.6(b)(7).

[2] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (rel. 1992), *expected to be codified* by S. 714. *See also*, Telemarketing Sales Rule, as amended, 16 C.F.R. 310.4(b)(iii)(B)(ii).

[3] The tension underlying a "one size fits all model" approach is replete throughout the Act. On the one hand, the key term "recipient" is defined as any "authorized user of [an] electronic mail address" to which a commercial email is sent, regardless of the context. Yet, the Report accompanying S. 877 speaks to both individuals and consumer, noting in the first instance that the bill provides "individuals using e-mail certain protections" while later stating categorically that S. 877 would "cover all consumers who receive email." S. Rept. 108-102, at 12.

privacy"[4] and that the change "is supported by the record that current technology allows for processing such opt-out requests more expeditiously"[5] than the current 10 business day period.

As we show below, the record does not support the FTC's rationale and conclusions. Moreover, the FTC's assertion that those who urged for a longer period provided "only the most conclusory information"[6] is unsubstantiated. SIIA respectfully submits that any reduction in the current time period will be impractical, disruptive to consumers, and pose significant costs to businesses that are seeking to comply with the Act. SIIA continues to urge that the period in this Rule conform to the requirements of the TSR.

At the outset, it is important to review the basis upon which the FTC may modify the ten-business-day opt-out period. Section 7704(c)(1) allows for modification if it is determined that a different time frame would be more appropriate "taking into account the purposes of section 7704(a)." It must also consider the "interests of recipients of commercial electronic mail" as well as the "burdens imposed on senders of lawful commercial mail." Rather than following the pathway outlined in these requirements, the FTC instead focuses – in our view overly narrowly – on the fact that some commentators asserted that certain technologies allow for processing opt-out requests "more expeditiously" than the current period. The FTC's conclusion, in our view, is both an inaccurate portrayal of the state of the technology and, more importantly, is not sufficient to meet the test for <u>reducing</u> the time period.[7] The FTC relied on situations involving only the interests of certain recipients – notably consumers who unsubscribe electronically – while ignoring other recipients and senders affected by this change, notably businesses and entities who maintain complex relationships with their vendors, suppliers, enterprise customers and sellers.

The FTC erred in concluding that the record "suggests that nearly instantaneous processing of a recipient's [opt-out] request ... can be accomplished without an undue burden."[8] In asserting that technology allows "virtually instantaneous"[9] execution of opt-outs, the FTC relies on a small handful of commentators which do not reflect a broad spectrum of senders of legitimate commercial email to support its step to reduce the time period.

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[4] 70 Fed. Reg. 25426 (May 12, 2005) (hereinafter cited in footnotes as "Notice") at 25442.

[5] Ibid.

[6] Notice at 25443.

[7] In our view, the FTC's reference to "enhanced privacy protection" does not constitute the kind of analysis required by Section 7704(c))(1) to support a reduction in the period, but is, instead, a generalized statement of the purpose of the entire Act. The FTC does not provide any detailed explanation of what specific privacy protections are "enhanced" by reducing the period by 7 days. Conversely, the FTC does not explain in detail what protections are "less" enhanced by extending the period to 30 days.

[8] Notice at 25444.

[9] Ibid.

First, several of the small entity commentators are promoting their own products, rather than describing their own internal (much less general industry) practices. In some of these cases, individuals cite speculative technologies that might work for small businesses with small email lists to manage, but which would not be applicable to medium or large enterprises that manage hundreds of thousands, if not millions, of customers in a variety of settings. This is not a fair sampling of private sector entities upon which to base a major rule change, particularly one that was not supported by the vast majority of respondents that commented on this particular issue.[10] In short, the FTC risks havoc by reaching conclusions that would be generally applicable to all entities, regardless of size, based on the thin evidence provided by a rather narrow set of commentators.

Second, almost all of the commentators cited by the FTC to support its 3 business day proposal describe the processing of opt-outs in the context of relatively simple subscriptions by consumers. This simple model does not take into account the fact that the Rule will apply to a variety of commercial email contexts, ranging from customers (both consumers and businesses) that purchase products and services to partnerships and relationships in the enterprise context. We explain in more detail – based on the record provided to the FTC last year – the specifics of the impracticalities below.

Third, and especially troubling, none of the entities relied upon by the FTC to support a reduction in the time period, in fact, argue that the period should be shortened. Many of those cited identify practical problems with the current 10 business day period; some even argue for lengthening the period and demonstrate in their comments how this period practically impacts their legitimate business processes.

It is noteworthy that of the two consumer and privacy groups that actually commented on the 10 business day element, one stated there was no evidence that it should be reduced[11] and the

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[10] Of the few entities actually cited in support of the FTC's proposition, many were small in size. For example, in footnote #210, one of the companies is RDS (which is, in fact, called Open Solutions-RDS (www.opensolutions.com), based on information provided when the number on the RDS submission is called, and headquartered in Connecticut, not Indiana, as stated in the submission) which is a publicly traded (not privately held entity, as asserted in the submission) with revenues in the range of $44.3 million in 2002 to just over $100 million in 2004. In the same footnote, the FTC cites ValueClick, which estimates that its total revenue in 2005 will be just over $200 million (http://media.corporate-ir.net/media_files/NSD/vclk/presentations/VCLK_Overview6905.pdf). NetCoalition, which is also cited to support the FTC's position in footnote #210, is not in the business of managing email itself, as it is a small trade association with less than one dozen members. Finally, GoDaddy, cited in footnote #211, is a privately held company with reported sales of under $50 milllion in 2003 and under 400 employees as reported by Inc. 500 (http://www.inc.com/resources/inc500/profiles/top25-2004/go-daddy-group.html). In footnote #213, the FTC relies on two comments. The first, Satchell, is unidentified by qualifications or background. The second, Karl Krueger, is an unidentified individual at the Woods Hole Oceanographic Institute and, in any case, refers only to effectuating simple opt out of subscriptions.

[11] National Consumers League.

other pointed out that it was consistent with its own self-regulatory policies, but noted that there were *situations where the 10 day window needed to be treated flexibly.*[12]

Of all the comments cited by the FTC to show that opt-outs could be dealt with expeditiously, therefore warranting a shorter time period, those from GoDaddy, ValueClick and MBNA were the most substantive.

GoDaddy, in fact, did not argue for a reduction to 3 business days, and indicated that a period somewhere between 5-10 business days would be adequate *based on its own particular experiences and operating assumptions*. A careful scrutiny of the basis for GoDaddy's statement, moreover, reinforces the simplistic assumptions underlying the FTC's proposal. GoDaddy assumes that a company maintains one database and that all of its operations are mechanized, key assumptions underlying the FTC's approach. As GoDaddy itself admits, it is unaware of other practices elsewhere in the industry. GoDaddy's central basis for supporting a reduction in the time period is its concern that a sender could abuse the window in which to implement the opt-out – an assertion that the FTC categorically rejects in the Notice as unsupported by the evidence.

ValueClick explicitly opposes shortening the period. While ValueClick indicates that it could process its own opt-outs within 2 business days, it clearly states that based on its work with companies in different industry sectors that "this is a new area for many advertisers" and thus urges that the processing period should not be modified at this time.

Finally, MBNA, representing a more realistic portrait of many entities with multiple customer databases, experience in managing consumer and business customer demands, and operating with complex marketing arrangements, argues for extending the period to 30 calendar days. The FTC asserts that MBNA provides proof that "opt-out requests received via an opt-out hyperlink can be added to a suppression list immediately."[13] On the contrary, MBNA details in a very professional and concrete way the necessary steps that many companies must take to implement opt-outs from start to finish. The FTC unreasonably and prejudicially takes one aspect of the MBNA timetable out of context. As MBNA concludes:

> "It is not simply a matter of adding the request to a list or database, which can be done within one or two business days. … [the] suppression list or database must be processed against any organization's list that may be conducting an e-mail campaign to its customers or members. It is this part of the process that makes the 10-business-day rule unrealistic."[14]

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[12] TRUSTe.

[13] Notice at 25443.

[14] MBNA (April 20, 2004) at 15.

Almost two dozen other commentators – and virtually all the substantive commentators – reach the same conclusion. As we describe more fully below, there are a number of aspects to the 10 business day time period that make it unrealistic, impractical and costly as outlined below.

The FTC's singular focus on the possibility of a technological approach does not satisfy the requirements of Section 7704(c)(1). In its commentary in the Notice, the FTC relies exclusively on the theory that a shorter period "is supported by the record that current technology allows for processing such opt-opt requests more expeditiously than the current ten-day time frame."[15] However, Section 7704(c)(1) requires the agency to "account for the purposes of section 7704(a)," an analysis which is not provided by the FTC.

Moreover, it must also consider the "interests of recipients of commercial electronic mail." This statutory requirement means the interests of <u>all</u> recipients, both consumers and business recipients. In this instance, as described above, the FTC relied on a set of commentators with a narrow model for employing commercial email, and which were primarily small entities. These commentators do not provide a basis for reaching conclusions with regard to commercial recipients of commercial electronic mail.

Finally, the FTC must also assess the "burdens imposed on senders of lawful commercial mail." Here, as well, the FTC failed to take into account the practical realities and costs facing many entities that for a variety of reasons – differentiated products, promotion of sound security practices, and effectuating privacy promises – choose to manage their commercial email programs through separate and distinct databases. Effectively, the draft Rule imposes a mandate on most entities to retrofit their existing structures, imposing a significant burden without either a basis in the comments or evidence of enhanced privacy protections. The analysis in the Notice also did not take into account that many of the affected entities must manage their on-going business or enterprise customer relationships as well as the entire range of marketing "opt outs" to which they are subject, such as those required under the TSR.

In an earlier, related context, the FTC determined that it was not appropriate to establish a bright-line standard for processing opt-out requests in connection with the Gramm-Leach-Bliley Act (GLBA) privacy notice and opt-out requirements. The analysis used by the FTC in reaching this conclusion is equally relevant to the situation at hand: in promulgating the final rules implementing the GLBA notice and opt-out requirements, the FTC and the federal banking agencies required entities to comply with a consumer's opt-out direction "as soon as reasonably practicable" after receiving the request under the GLBA because – as was made clear in the FTC's commentary accompanying the GLBA final rule's privacy requirements – "it is appropriate to retain a more general rule in light of the wide range of practices throughout the various financial institutions within its jurisdiction."[16] Because of the even greater diversity of sectors and companies affected by the CAN-SPAM Rule, the FTC should be <u>more</u> flexible in

[15] Notice at 25442.

[16] 65 Fed. Reg. 33,646 (May 24, 2000) at 33,665.

applying a "one-size-fits-all" approach to the application of technology (and to the assumption about instantaneous suppression of email opt-outs) in its Final Rule. In our view, the 31 calendar day rule would best serve this diversity.

The FTC erred in concluding that the record "provided only the most conclusory information"[17] to support either the existing time period or for expanding it. Our review of all the major comments finds little support for this assertion. On the contrary, and in stark contrast to the limited basis for putting forward a shorter time period, the record shows that many entities provide detailed support for both not reducing the period and for adopting a longer period that takes into account the operations of legitimate companies that use legitimate commercial email.

For example, MBNA, cited by the FTC in support of a 3 business day period, in fact provides detailed charts and explanations for the key steps required to ensure that suppressions are done in an efficient, verifiable and workable manner – contrary to the FTC's assertion that commentators "omitted details about how or why ... complex arrangements affect the time and procedures involved in processing opt-out requests."[18] SIIA confirms that many of the steps identified by MBNA in its comments are indicative of the challenges that many of our members face in working with multiple databases, a variety of marketing partners, and commercial customers with which they have on-going relationships.

In short, the FTC's analysis does not take into account the following aspects of legitimate commercial email marketing which do not allow for instantaneous suppression of emails and provide ample support for lengthening the period beyond the current 10 business day rule:

Email lists are maintained in multiple databases, reflecting product differentiation, security needs, and promises made to protect privacy. This important fact is made by a number of commentators.[19] The process of verifying that an email, which may not be reflected consistently in all databases, requires careful attention – often over a period of days – to the suppression process. As some commentators note, many of these processes are done in batch form[20] and must be scheduled on a regular basis to avoid inaccurate results. For many companies, the demand on servers and bandwidth capacity constrains the timing of these operations and dictates that these processes may be spread out over several days. For example, a

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[17] Notice at 25443.

[18] Notice at 25443, citing only NNA and MBNA, both of which provide concrete details.

[19] See comments from MBNA. See also, e.g, , comments by AT&T, Discover Bank, DoubleClick, Electronic Retail Assn., EPSC, Experian, Magazine Publishers Assn., MBNA, Motion Picture Assn. of America, Nat'l Auto Dealers Assn. (businesses in this industry "maintain separate databases for their different departments, e.g., sales, service, parts") , Nat'l Newspaper Assn., Nat'l Retail Federation, Newspaper Assn. of America ("It is simply not the case that a newspaper company possesses a single mater email list."), SIIA, TimeWarner.

[20] Visa USA. See also comments from the Securities Industry Assn.

process that requires running suppressions against one million of more email addresses may be done in batches of 100,000 or so to prevent overload and efficient use of information technology systems which support a variety of critical enterprise applications. Thus, an email address that is received on a Monday may not be processed until the following Saturday under this scenario, leaving little time for the other steps in the process to be accomplished with the 10 business day period, and certainly exceeding the 3 business day period.

Management of the processing of email lists is not fully automated, reflecting both diverse levels of automation in different sectors and the need for careful treatment of opt outs in an on-going business relationship. This real world description of the process is raised by a number of commentators.[21] At a minimum, the comments in the record belie the FTC's assumption that processing of emails is full automated, and that for many commercial email senders, both the 10 business day rule (and any shorter period) will require substantial investment to routinize these procedures technologically. Moreover, there are good reasons why the Rule should respect non-automation. In our review of procedures by SIIA members, many of the recipients of email are commercial business partners. When an opt-out is received, efforts are made to verify the identity of the customer, understand the nature of the opt-out request (e.g., does the request apply just to email or other kinds of contacts), and ensure that all lists are scrubbed. While labor intensive, the time and effort involved to know what has happened with a business partner is a necessary element to competing in a global marketplace.

The widespread use of 3rd party email service providers makes the current 10 business day rule impractical, and any reduction in the time period heightens the likelihood of error, consumer frustration and unnecessary liability for commercial entities. This important description of commercial email marketing is put forward by a number of commentators.[22] The complexity of using 3rd party service providers to send email, based on our review of SIIA member practices, means that 10 business days leaves little margin for error in running suppressions files; does not account for the logistics of sending and receiving lists; and fails to consider the time required for internal list processing, data processing and email delivery preparation.

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[21] See comments from MBNA See also, e.g., AT&T, Countrywide Financial Corporation (noting the role that "one-to-one emails" play in their operations), Experian (noting that many entities may have to upgrade to automated systems to meet the requirements of the Act generally), Independent Sector (noting that smaller nonprofits do not have extensive resources to devote to data management systems), Mellon Financial, ("For many organizations, these activities are not, and cannot become in the near future, highly automated."), Mortgage Bankers Assn., and Nat'l Retail Federation ("list scrubbing can include time-consuming manual data entry").

[22] See comments from MBNA. See also, e.g, , comments by AT&T, Countrywide Financial, Discover Bank, Electronic Retail Assn., EPSC ("may take a couple of weeks to ensure that an email address is properly suppressed from all of the operations and lists that may be used by a single, large company"), Experian, Magazine Publishers Assn. ("an email request can often be over a week old before it is received by the publisher"), Mastercard Int'l ("marketing done in an electronic environment is not synonymous with instantaneous processing"), Mellon Financial, Mortgage Bankers Assn. (includes detailed problems with timeline based on survey of members' actual practices), Motion Picture Assn. of America, Nat'l Retail Federation, Newspaper Assn. of America, Securities Industry Assn., SIIA, TimeWarner, and Visa USA.

The role of joint marketing and multiple product\line of business email promotions make the 10 business day rule impractical, and any reduction in the time period heightens the likelihood of error, consumer frustration and unnecessary liability for commercial entities. A number of substantive commentators detail practical concerns in this area.[23] As described in these comments, the logistics of managing opt-outs and email list development when multiple senders are involved makes the 10 business day window impractical, leaving little margin for error. As we note below, the FTC leaves open in the draft Rule the possibility that there could be multiple "senders" in a variety of joint marketing email scenarios that make the time period problematic (to say nothing of the negative effects of reducing the period to 3 business days).

The FTC's response is merely to say that "very few comments … addressed how long it takes for each step of the opt-out process."[24] Our review of the record, including all of the substantive comments received, indicates that the FTC has ample and sufficient evidence before it to demonstrate the impracticalities of not only the current 10 business day Rule, but any reduction thereto, for many sectors and many legitimate companies. The FTC's review appears arbitrary and unreasonable, and fails to take into account that:

> "the 'average' time to create and implement procedures for collecting and applying suppressions, and the time for actually collecting and applying suppressions, varies by organization, industry sector, and complexity of the system. Each system for maintaining, distributing and using lists of email addresses has a unique process with distinct variables."[25]

SIIA concurs with this view. While we certainly have members who process relatively simple "unsubscribe" opt-outs in a short period of time, we have many other members who require more than 10 business days to implement opt-outs among multiple databases, using non-automated processes, taking into account the use of 3rd parties, a variety of joint marketing efforts, and the operation of critical security and privacy policies and plans. While some of the comments on the record do not provide the detail found in the submission by MBNA, the timeline, taken as a whole, is an accurate reflection of what is experienced by many of our members, whose sizes range from the some of the smallest to the largest in the industry.

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[23] See comments from MBNA. See also, e.g, , comments by AT&T, Discover Bank, EPSC, Experian ("the process of [of implementing opt-out requests in the context of third party messaging] can take up to ten business days to collect, transfer and apply the requests"), Magazine Publishers Assn., Mastercard Int'l, Nat'l Retail Federation, Promotion Marketing Assn., Reed Elsevier, ("Our businesses frequently partner with other companies to co-sponsor programs and events …. It will take more than 10 days to review and comply with all opt-out requests sent to all parties involved."), SIIA, TimeWarner, U.S. Chamber, and Visa USA.

[24] Notice at 25443.

[25] Experian at 5.

The FTC erred in not considering the timeline for opt-outs found in the final Telemarketing Sales Rule as meeting the requirements under Section 7704(c)(1). As the FTC recognizes, a "substantial number" of commentators urge that the time period be changed to conform to the requirements of the Telemarketing Sales Rule, which requires that telemarketing lists be scrubbed every 31 calendar days.[26] The FTC, in fact, cites only a small share of those urging changes in the Notice.[27] Others proposed similar, but relatively equivalent tests ranging from twenty (20) business days[28] to fifteen (15) business days.[29]

We respectfully submit that the FTC does not address the central thesis of those advocating conformance among the Rules, and instead relies on a narrow set of commentators and false promises of speculative technological approaches. In addition to the practical limitations of the 10 business day approach cited above, all of the commentators we identify point to the real benefits to businesses – and consumers – with having a single timeline for possessing opt outs. As one submitter succinctly put it, companies have been:

> "inundated with new .... compliance rules related to the use of telephone calls, facsimile machines and now electronic mail. ... Since companies are already reconfiguring their compliance practices to accommodate the 31-day scrub for telephone calls, it seems only reasonable that the FTC adopt a similar timing requirement for electronic mail messages."[30]

SIIA concurs with this conclusion. Our members have spent vast time and resources to educate their marketing teams and work with 3rd party vendors to implement the 31-calendar day timeframe. We urge the FTC to recognize that the interests of a single approach on this particular issue meets not only the purposes for which 7704(a) was enacted, but also the needs of commercial email recipients (both consumer and businesses) as well as not placing undue burdens associated with mandating divergent approaches.

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[26] 69 FR 16368 (March 29, 2004).

[27] In addition to ABM, Chamber, Well Fargo, Direct Marketing Assn., Piper CBA, Magazine Publishers Assn., and American Banks Assn., cited by the FTC, our review of the record found the same recommendation is made by AT&T, Countrywide Financial, Discover Bank, Electronic Retail Assn., EPSC, Independent Sector (representing many non-profits), Mastercard Int'l, Mellon Financial, Nat'l Assn. of Realtors, Nat'l Auto Dealers Assn., Nat'l Multi-Housing Council\Nat'l Apartment Assn., Nat'l Newspaper Assn., Nat'l Retail Federation, Newspaper Assn. of America, Promotion Marketing Assn., Reed Elsevier, and SIIA.

[28] Mortgage Bankers Assn, Securities Industry Assn.

[29] TimeWarner.

[30] Nat'l Multi-Housing Council\Nat'l Apartment Assn at 3.

DEFINITION OF "VALID PHYSICAL POSTAL ADDRESS"

SIIA commends the approach taken by the FTC regarding what constitutes a valid physical postal address. In particular, we commend the FTC's analysis describing the basis for the changes to the proposed Rule, which will define it as any of the following: (1) the sender's current street address; (2) a Post Office box the sender has registered with the United States Postal Service; or (3) a private mailbox the sender has registered with a commercial mail receiving agency ("CMRA") that is established pursuant to United States Postal Service regulations.

"FORWARD-TO-A-FRIEND" SCENARIOS

SIIA has carefully reviewed the FTC's clarification of how the Act will treat "forward-to-a-friend" programs. Many commentators providing substantive responses to the FTC urge that the Act would be served, and consumers protected, by making it explicit that forward-to-a-friend programs are not subject to the requirements of the CAN-SPAM Act.

In a number of important respects, SIIA commends the approach taken by the FTC. We agree that by making available the <u>means</u> for forwarding a commercial email message – such as a "click-here-to-forward" mechanism on a website – an entity engages in conduct that generally would be within the ambit of "routine conveyance"[31] that does not constitute initiation of a commercial email message and therefore not subject to the Act.[32] It is, therefore, appropriate that the FTC concludes that "it seems clear that a seller that simply offers a mechanism on a Web site for forwarding advertising engages in 'routine conveyance' when someone other than the seller identifies the recipients or provides their addresses."

However, SIIA is concerned that the FTC appears to overreach in its analysis of how the terms "procure" and "induce" apply in the context of initiating a commercial electronic mail message through "forward-to-a-friend" programs.[33]

SIIA respectfully submits that the FTC's approach is not required by the Act, is inconsistent with the purpose of defining "procure" and "induce" under the Act, and is

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[31] Defined as "the transmission, routing, relaying, handling, or storing, through an automatic technical process, of an electronic mail message <u>for which another person has identified the recipients or provided the recipient addresses</u>." 15 U.S.C. 7702(15) (emphasis made by FTC).

[32] 15 U.S.C. 7702(9).

[33] See 15 U.S.C. 7702(12).

overbroad.[34] There is no indication that Congress had "forward-to-a-friend" programs in mind when defining "sender." The Senate Report accompanying S. 877 makes this abundantly clear: "The intent of this definition is to make a company responsible for email messages that it hires a third party to send."[35] The Report goes on to clarify that the Act is "meant to impose a responsibility on a company hiring an e-mail marketer to inquire and confirm that the marketer intends to comply with the requirements of this Act."[36] By contrast, in a "forward-to-a-friend" scenario, the advertiser or promoter – as the FTC correctly concludes in the Notice – is not sending the email nor hiring the "friend" but providing routine conveyance. Similarly, the "friend" in these instances (whether in the form of co-employee, colleague, customer, business associate, etc.) is not in a situation equivalent (or even similar) to that of a third party which is hired by the advertiser for the purpose of carrying out a commercial email marketing program.

The Senate Report also clarifies that the Congress sought to ensure through use of the term "procure" that "the hiring company cannot avoid responsibility by purposefully remaining ignorant of the third party's practices."[37] In our view, and based on the way that "forward-to-a-friend" programs work, the definitions of "procure" and "intent" as elements of what constitutes "initiate" are not undermined when a "friend" utilizes the routine conveyance of "forwarding" emails through mechanized or non-mechanized means, *even where a reward or benefit is given to the "friend" by the advertiser.*

As the Senate Report makes clear, the scenario envisioned by use of these definitions involves the intentional hiring of a third party marketer, and not enencouraging or persuading a "friend" of the recipient, to carry out the sending of commercial email messages. Any concern with avoiding the requirements of the Act is mitigated since, as SIIA pointed out in its submission last year, the advertiser will ultimately have to address the requirements of the Act if the recipient opts to respond to the information from the friend. "Forward-to-a-friend" programs which provide for a limited number of recipients and are often sent manually by someone without privity to the advertiser are distinctly different than email programs contracted for or hired by the advertiser. This is a critical point, and one that the FTC did not address in the Notice.

SIIA respectfully requests that the FTC remain consistent with the parameters of what Congress sought which is to combat those situations where a sender intentionally attempts to avoid application of the Act by procuring or inducing a third party to send commercial emails on its behalf. Inherent in this view is that consideration is relevant and necessary to whether a

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[34] We note that at least one very substantive comment (Microsoft) raised concerns with the potential of the FTC to overreach in treating "induce" separately from "procure." The FTC did not address the substance of these concerns in the Notice.

[35] S. Rept. 108-102 at 15 (emphasis added).

[36] Ibid (emphasis added).

[37] Ibid.

third party has been hired or contracted with to carry out the commercial email marketing program.

We are particularly troubled that the FTC finds that use of phrases like "Tell-A-Friend – Help spread the word by forwarding this message to friends!" or "To share this message with a friend or colleague, click the 'Forward Email' button" are forms of inducement under the Act.

The definition of "induce" constructed by the FTC in the Notice is broader than and distinct from the operational definition of "procure." According to the FTC, "induce" does not require a transfer of something of value. To support its position, the FTC resorts to Webster's Dictionary to define "induce" as meaning "to lead on to; to influence; to prevail on; to move by persuasion or influence."[38] The FTC draws an extremely broad conclusion that in order to "intentionally induce" initiation of a commercial email, the sender must "affirmatively act or make an explicit statement that is designed to urge another to forward the message."

The approach taken by the FTC is contradicted by the actual language of the definition, and is out of line with the Senate Report 108-102 indicating the specific purpose of including "procure" and "induce" in the Act. In particular, the term "induce" was included as a component of the term "procure" as way of encapsulating the proscribed "intentional" acts to pay or provide other consideration to initiate a commercial email message. Neither the Act nor the Congress constructed this definition out of any desire to prevent anyone from "persuading" a colleague or friend from providing information related to a commercial product or service.

The FTC's broad application of what constitutes "induce" comes precariously close to regulating speech in a manner that is unnecessary to accomplishing and beyond the purposes of the Act.[39] Having correctly determined that a "forward-to-a-friend" program constitutes a routine conveyance under the Act, the FTC does not show with any degree of certainty or predictability that "hyping" the link or using eye-catching phrases – or, for that matter, using different colors, fonts, symbols, etc. – to draw attention to the link would put the exact same mechanism beyond the scope of what is a "routine conveyance." SIIA respectfully submits that the FTC is on stronger and more consistent ground by simply and logically tying "induce" back to the requirements of "procure" which must be both intentional and include a payment or "other consideration" that leads to a third party initiating a commercial email message marketing program.[40]

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[38] Notice at 25441.

[39] According to the FTC's analysis that mere persuasion is enough to find that inducing a commercial email message constitutes an initiation, the FTC would make an advertiser who verbally encourages another to send an email advertising or promoting the former's product or service to a "friend" potentially in violation of the Act. The FTC's premise does not provide for distinguishing the legal difference when the phrase, "Tell-A-Friend – Help spread the word by forwarding this message to friends!" is placed on a website or communicated verbally by phone or in-person.

[40] If, assuming *arguendo*, the FTC is correct in its interpretation of "procure" and "induce", SIIA submits in the alternative – consistent with the FTC's recognition that a "forward-to-friend" program is generally a form of

SIIA also urges the FTC to proceed with caution when it applies the fact-based determination that the presence of a payment or consideration is relevant to whether a procurement is subject to the Act. In our view, the payment or consideration must be directly tied to the hiring of third parties to send commercial email for the requirement to apply. Thus, regardless of the outcome that the receipt of the email may produce, the definitional requirement must be such that it directly leads to and is associated with a third party initiating the email on behalf of the advertiser, who seeks to avoid responsibility for being a sender under the Act. This situation is distinct from one where an incentive is tied to the ultimate sale or purchase of a product or service. This is important since many legitimate commercial marketing programs provide incentives when a sale or purchase has been concluded. An email providing information may be only incidental to these efforts, which may involve communications through other legitimate means (letter, visit, phone call, etc.). The FTC should make clear that the element of consideration does not apply to these situations.

JOINT MARKETING:
SINGLE MESSAGE\MULTIPLE ADVERTISERS – MODIFY DEFINITION OF SENDER UNDER THE ACT

SIIA appreciates the FTC recognizing the concerns expressed last year that the Act could make all advertisers in a joint marketing effort the "senders" raising both practical questions and potential conflicts about the way these programs work. The FTC appears to agree for the most part with the concerns made by commentators. SIIA believes the agency has put forward a useful proposal to modify the definition of "sender" under the Act "so that in situations when more than one person's products or services are promoted or advertised in a single email message, those sellers may structure the sending of the email message so that there will be only one sender of the message for purposes of the Act."[41] SIIA strongly supports this basic element put forward by the FTC. The ability of sellers in a joint marketing arrangement to be able to determine among themselves the entity that will manage responsibilities under the Act is central to keeping these important programs going, and avoiding unnecessary liability and confusion on the part of the implementers.

In the Notice, the FTC outlines an approach that (a) when one or more person's products or services are advertised or promoted in a single email, each person who is within the Act's definition (i.e., "initiates" an email) will be considered a "sender", UNLESS (b) one of the initiator-senders meets one or more of the following criteria:

(i) The person controls the content of such message;
(ii) The person determines the electronic mail addresses to which such message is sent; or

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"routine conveyance" provided in the Act – that they go to persuading a "friend" to utilize the legitimate "routine conveyance" mechanism and not the initiating of a commercial email message.

[41] Notice at 25430.

(iii) The person is identified in the "from" line as the sender of the message;

in which case the person that meets one or more of the criteria will be deemed the "sender" and must ensure that the requirements of the Act are met.

However, the analysis provided by the FTC raises some confusing examples that deflect from the clarity of its proposal. Initially, in the preamble to the tests above, the FTC states that a "sender" is a person that meets both the Act's definition and "meets one or more" of the criteria set forth above. Later, the FTC uses an example involving X, Y, and Z sellers, and states that if X has been designated as the "sender" by the others then *among the three* sellers only X may control the message's content, control its recipient list or appear in its "from" line. Further confusing the situation, the FTC then states that "X need *not* satisfy *all three* of these criteria, but *no other seller* may satisfy *any* of them."[42]

SIIA suggests that clarification of this test is necessary and could occur along any of several lines in order to achieve the legitimate goal of preserving the ability of advertisers in a joint marketing arrangement to determine the rules for their program, including who among them will fulfill the requirements of the Act.

First, SIIA urges that so long as any one of the senders legitimately meets one of the criteria then there is a sufficient basis for determining the "sender" consistent with the Act. The FTC offers no rationale for why further scrutiny of whether any other seller is capable of meeting another criterion furthers the purposes of the Act or makes its implementation less burdensome to commercial enterprises or more beneficial to recipients. In our view, the further scrutiny beyond the initial determination is unnecessary.

Second, in the specific instance where a subscription is involved, the FTC should explicitly state that the "sender" should be the entity that provides the delivery of the good or service – i.e., the subscription -- to which the recipient is entitled. This approach is consistent with the requirements laid out in FTC's "primary purpose" Rule.

Finally, we urge the FTC to further consider its first criteria, involving "control of the content of the message." As currently stated, and in combination with the FTC's analysis highlighted above, this formulation has the real potential to confuse implementers and make enforcement of the Act difficult. Depending on what is meant by "control," it may be difficult to establish that only one of the multiple senders controls the "content" of a message. If more than one sender controls message content, then under the proposed criteria the multiple senders would be unable to meet the single-sender criteria.

There are a number of viable ways to determine what we understand the FTC means when it refers to "control of the content of the message." First, the FTC could clarify that "control" does not include a company creating its own advertisement or approving ad copy for a joint marketing message. Multiple advertisers should not be disqualified from designating a

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[42] Notice at 25428 (emphasis in original).

single sender because they can (and do) approve their own ad copy in a message. These are important factors to help consumers and businesses ensure that senders are sending appropriate and non-deceptive content, and are the norm for the types of actions all advertisers undertake. Second, the FTC could clarify that "control" means "final assembly" or "final layout" of material provided by the joint marketing participants. Third, the FTC could clarify that "control" is a function of which sender, as determined by the partners, takes responsibility for the logistics, scheduling and timing of the sending of the message. Finally, the FTC could eliminate the "control" test and rely on the other two without detrimental effect to enforcement of the Act.

CONTENT OF "FROM" LINE AS IT RELATES TO IDENTIFY OF THE "SENDER"

SIIA commends the FTC for its analysis and approach with regard to what information may or may not be disclosed in the "from" line. This is important not only to combat abuse, but to make sure that legitimate companies are not penalized when they use names by which they are generally known.

As we read it, the FTC puts forward an interpretation of the Act[43] (which the agency does not propose to codify in the Rule) that focuses on whether the "from" line accurately identifies <u>any</u> person who initiated the message.[44] The FTC states that the "from" line does not have to contain the initiator's formal or full legal name, but "it does mean that it must give the recipient enough information to know who is sending the message."

SIIA appreciates the flexible approach taken by the FTC, where in the Notice it indicates that senders should consider their messages from the perspective of the "reasonable recipient." In a further step to avoid confusion, and provide certainty and predictability, SIIA asks that the FTC (whether in commentary, guidance or other lists) include in the list of possible names that are indicia of accuracy <u>a company's brands and service names</u>, which may be the most accurate – and least confusing – to the vast majority of "reasonable recipients."

[43] 15 U.S.C. 7704(a)(1)(B) establishes that "a 'from' line . . . that accurately identifies any person who initiated the message shall not be considered materially false or misleading."

[44] SIIA also recognizes that the FTC examines whether the "from" line has been altered or concealed in a manner that would impair the ability of an ISP or a law enforcement agency to identify, locate, or respond to the person who initiated the message, which would be an obvious violation of the Act.

SEPARATE LINES OF BUSINESS OR DIVISION -- DEFINITION OF SENDER

The FTC indicates in the Notice that it will incorporate in the Rule the Act's language regarding obligations under CAN-SPAM when an entity's separate lines of business or divisions transmit email messages.[45] Thus, under the draft Rule, the FTC proposes that when a separate line of business or division initiates a message in which it holds itself out to be that line of business or division rather than the entity of which it is a part, the "sender" of the message will be considered to be the line of business or division.

SIIA commends the FTC for rejecting the call by a limited number of commentators to expand the application of the requirements to third parties who merely provide a list of names or transmit a commercial email on behalf of those whose products or services are advertised in the message.

In the view of SIIA, incorporation of the Act's language addressing separate lines of business or divisions is appropriate and helps to clarify the obligations under the Act. To expand the application of the requirements beyond this limit would be both inconsistent with the law and would not contribute to its greater effectiveness.

SENDER LIABILITY FOR PRACTICES OF AFFILIATES OR OTHER SIMILAR ENTITIES

The FTC inquires as to whether entities should not be held responsible for email messages advertising their product or service if the messages are sent by affiliates or other third parties over which they have no control.[46] As we understand it, the FTC finds that providers must monitor the activities of third parties <u>with whom they contract</u>.

SIIA expressed its concern last year about applying the Act mechanically with regard to third parties, because many of our members use resellers or other outlets with which they have contracts, but do not exercise control over how their products or services are marketed. The mere fact that an entity has a contract with a third party does <u>not</u>, in the distribution or resale context, mean that it exercises control over its partners.

The FTC asks for comment on whether a "safe harbor" should be added in these situations, and what it would look like. With regard to a safe harbor to minimize liability with regard to the actions of unrelated third parties, SIIA welcomes the FTC's interest in the issue. As a preliminary proposal, we would urge that the FTC recognize that, unless an entity's privacy policy requires other actions/steps, that a sender:

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[45] 15 U.S.C. 7702(16)(B).

[46] We note that a definition of "affiliate" is not provided by the FTC nor found in the Act.

- use reasonable care in selecting third party marketing partners (perhaps a presumption that reasonable care is not used if an entity enters into a relationship with a partner that has known record of intentionally violating the Act);

- have a contractual relationship with partners laying out responsibilities for compliance with the Act, including reasonable means used to audit compliance with such audits to be regularly conducted to assess compliance-and changes requested where compliance not detected; and

- If an entity has in place a privacy policy that relates to the conduct of activities on its behalf by unrelated third parties including the sending of mail or marketing communications on its behalf, that privacy policy shall take precedence, and shall create a safe harbor to the extent that the entity's actions are consistent with the provisions of that privacy policy.

VARIOUS QUESTIONS RELATED TO TRANSACTIONAL OR RELATIONSHIP MESSAGES

SIIA recognizes that the FTC declines, at this stage, to exercise its authority[47] to expand or contract the categories of messages that would be treated as a transactional or relationship message.[48]

SIIA, nonetheless, offers comments below in response to a number of the questions that the FTC outlined with regard to a number of specific scenarios.

- **How Many Confirmation Messages May a Sender Transmit Pursuant to a Single Transaction?**

The FTC notes that the Act is silent as to the number of times a sender may transmit to a particular recipient a message to facilitate, complete, or confirm a single commercial transaction. As we understand the FTC's analysis, the Commission believes that, given the purposes of the Act, "a standard of reasonableness is implied, and that senders must meet that standard."[49] It cites two examples, expressing concern that if a company sent hourly confirmations of a transaction that "warranted merely a single such notice" – particularly if the message also

[47] 15 U.S.C. 7702(17)(B).

[48] 15 U.S.C. 7704(a)(1).

[49] Notice at 25434

contained content advertising or promoting products or services – the FTC "would likely view such messages as commercial and not transactional."[50]

SIIA views the FTC's application of a standard of reasonableness as appropriate, but it must take into account the nature of the transaction and the industry involved. SIIA is aware of a number of instances where the facilitation, completion or confirmation of a commercial transaction that a recipient has previously agreed to enter into may warrant frequent – including hourly – confirmations which also contain commercial content. These include time-sensitive situations, such as stock quotes, auction items, time-limited offers, etc.

- **Do Messages Negotiating a Commercial Transaction Satisfy the Requirements of a Transactional\Relationship Message?**

SIIA has carefully considered the FTC's limited analysis on this issue and respectfully submits that, in the end, it may be a source of confusion to those companies that attempt to adhere to the requirements of the Act while engaging in legitimate transactions. On the one hand, the FTC states its belief that "to the extent that negotiation may be considered a 'commercial transaction' that a recipient has previously agreed to enter into, it would seem that such messages likely would be considered transactional or relationship as long as they were sent to facilitate or complete the negotiation."[51] On the other extreme, the Notice also states that an initial unsolicited message that proposes a transaction and attempts to launch a negotiation by offering goods or services does not meet the requirements of being transactional or relationship. Rather, such a message would likely be categorized as a commercial email message, and would be required to comply with all prescriptions of the Act.

The problem with the FTC's analysis is that it does not take into account the reality of negotiations, particularly where the two entities involved are **not** consumers.

In addition to the basis stated in the Notice for not treating a negotiation message as a "commercial email", the FTC should also take into account the recipient's affirmative consent to engage in negotiations, which is the theory it laid out for sending email in response to a recipient's request for information (see below). The FTC analysis on this point should not be based merely on whether a negotiation is to complete a transaction, but also on the fact that the negotiators have waived any right to "opt out" as negotiations proceed.

[50] Ibid.

[51] Notice at 25434.

- **How should "scheduled maintenance" be treated under the transactional or relationship rules?**

SIIA has carefully reviewed the FTC analysis on this point, and is concerned with the approach taken by the FTC. In the Notice, the FTC attempts to analyze whether scheduled maintenance should be considered "safety or security information" and therefore transactional or relationship under Section 7702(17)(A)(ii). The problem is that the Notice gets into a tortured discussion of whether the scheduled maintenance is "designed to ensure the safe operation of a product"[52] – in which case it would be exempt from the requirements of a commercial email. If it is not so *designed*, then emails related to scheduled maintenance would not benefit, according to the FTC.

In our view, this level of inquiry puts the FTC in an overly prescriptive posture. In our industry, scheduled maintenance is precisely the kind of service that a customer is entitled to receive under the terms of the transaction, whether agreed to as part of the original transaction or ultimately during the course of the on-going relationship. SIIA strongly urges the FTC to emphasize that in many sectors (such as software, information technology and information services) scheduled maintenance is, more than likely, to be covered under Section 7702(17)(A)(v) which permits messages to deliver goods or services, including product updates and upgrades, that the recipient is entitled to receive under the terms of the transaction that the recipient has previously to.

- **What constitutes information "directly related to an employment relationship or related benefit plan?**

SIIA offers a number of comments in response to this question. First, we very much appreciate the FTC's recognition that a third party may market goods and services to the employees of an employer where it is authorized to do so on behalf of the employer. This recognition is important, as it reflects the reality that employers provide a wide range of products and services to its employees for which it makes both economic and logistical sense to have commercial communications – whether by email, phone or mail – come directly from the third party provider.

However, we are concerned with statements in the Notice to the effect that <u>any</u> message (that otherwise meets the definition of "commercial email") sent by an employer to an employee does <u>not</u> qualify *per se* as a transactional or relationship message. We urge the FTC to tread carefully in this area, as its jurisdiction does not encompass the general area of labor-management relations, and it must be careful not to under interpret application of this exception *particularly when the employee/email recipient receives what is otherwise commercial email at*

[52] Ibid.

an email address provided or controlled by of the employer. [53] It is our view that this is the right way to understand the use of the word "directly" in the statute and makes enforcement and application of the Act enforceable and workable.

Thus, SIIIA answers "yes" to the questions posed by the FTC on this subject: Is it appropriate to classify messages offering employee discounts or other similar messages as transactional or relationship messages that "provide information directly related to an employment relationship"? Is a relevant factor the employer's provision of the email address to which such messages are sent to the employee? For example, should all messages sent from an employer to an employee at the employer-provided email address be considered transactional or relationship under section 7702(17)(A)(iv)? SIIA believes that this approach is consistent with the goal of interpreting the exceptions to the Act narrowly, without overregulation by the FTC in an area where it has neither jurisdiction nor experience. Even where the employee has provided a non-employment email address to the employer, the presumption should be that the relationship meets the requirements unless the employer is given an affirmative opt-out by the employee.

A more difficult question arises, however, where the email message involves a related benefit plan in which the recipient is currently involved, participating or enrolled. In some cases, the recipient may no longer be employed by the employer, but still otherwise meets the qualifications of Section 7702(17)(A(iv).

- **How should requests for information be treated?**

In response to a number of requests to clarify the treatment of an email sent on an individual basis, the FTC provides some useful analysis where an email is sent that may contain information specifically requested by the recipient. In the FTC's view, it appears that the real issue is how to treat the requests when the recipient has previously opted out. Rather than treating them as transactional or relationship messages, the FTC believes that the answer lies in Section 7704(a)(4) of the Act, which "which makes clear that even commercial email messages may be sent to a recipient who has previously opted out 'if there is affirmative consent by the recipient subsequent to the opt-out request.'"[54] In the FTC's view, consumers who request information or consent to receive it would, presumably, have provided "affirmative consent," thus enabling the sender to respond.[55] SIIA appreciates the FTC's interpretation.

[53] For purposes of avoiding ambiguity, SIIA urges the FTC to make clear that where an employer provides an employee with potential benefit plan information to which the employee has not yet signed up, such a message constitutes the provision of information directly related to an employment relationship. This clarification is necessary to avoid running afoul of the language in the later half of that paragraph which describes an exception for providing information regarding a related benefit plan in which the recipient is <u>currently</u> involved, participating or enrolled.

[54] 15 U.S.C. 7704(a)(4)(B).

[55] 15 U.S.C. 7702(1)(A) (defining "affirmative consent" to mean "the recipient expressly consented to receive the message, either in response to a clear and conspicuous request for such consent or at the recipient's own initiative").

EXPIRATION OF OPT-OUT REQUESTS

The FTC has proposed no time limit on the duration of an opt-out. SIIA respectfully urges the FTC to reconsider this position.

SIIA recommends a duration of less than five years. Over time, the list of e-mail opt-outs that a company would need to suppress will grow and many of these e-mail addresses will become non-functional, thus requiring the expense of scrubbing the list against non-functional addresses. The FTC acknowledges there is no list of non-functional e-mail addresses to use to remove such addresses from opt-out lists. A duration of less than 5 years would help solve this problem.

Similarly, in many business settings there are common e-mail addresses that are reassigned in a manner similar to the way phone numbers are reassigned. Limiting the duration to less than five years would reduce expenses associated with scrubbing against inoperative e-mail addresses, as well as ensure that individuals who obtain reassigned e-mail addresses will not be unknowingly opted out of receiving commercial e-mail that they mat wish to receive. Persons with functional e-mail addresses whose addresses re-enter sender lists periodically can simply renew their opt-out requests as appropriate.

PROHIBITION ON CHARGING A FEE OR IMPOSING OTHER REQUIREMENTS ON RECIPIENTS IN ORDER TO "OPT OUT"

The draft Rule includes a broad prohibition on the imposition of any fee, any requirement to provide personally identifying information (beyond an email address), or any other obligation as a condition for opting out of receiving future commercial emails.

We understand that the FTC did not raise this issue last year, but is now concerned that "some email marketers are attempting to use the CAN-SPAM opt-out mechanism as an opportunity to collect information about recipients or to subject them to sales pitches before an opt-out request is completed" or "conceivably ...even attempt to charge recipients a fee for accepting or honoring their opt-out requests."[56]

SIIA supports the policy behind this proposed prohibition. We caution the FTC, however, that senders need flexibility in the types of information they may request and the means they use to authenticate and verify the legitimacy of opt-outs, so that recipients are not unknowingly opted out of messages by others.

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[56] Notice at 25445.

This can occur, for example, where multiple user accounts are stored under a single email address, or where there is sufficient ambiguity in the email address. In the latter, example, "johnsmith@yahoo.com" may not provide an entity sufficient information to know which customer is exercising his or her opt out rights, particularly where the account information in its databases is sorted and stored by other fields (such as full name or address). In the context of these legitimate objectives, limiting the information that an entity may request solely to the email address is insufficient to ensure that the right customer's opt out has been processed correctly.

There are a number of other ways in which this can occur, and the FTC's proposal raises potential conflicts with these legitimate steps. For example, in many cases, requiring a recipient to visit a single web page may not provide certainty required by senders. To provide for such certainty, recipients may be required to enter their e-mail addresses on one web page and then provide confirming information sent back to that address on another web page. Allowing sufficient flexibility to effectuate such opt-outs would provide protections to both businesses and consumers.

Moreover, the specific approach put forward by the FTC to prohibit a recipient from "provid[ing] any information other than the recipient's electronic mail address and opt-out preference" or "tak[ing] any other steps except sending a reply electronic mail message or visiting a single Internet web page"[57] is not required by the Act, is not narrowly tailored to meet the purposes of the Act, and conflicts with legitimate steps that entities should be able to take to verify opt outs.

AGGRAVATED VIOLATIONS –
DISCUSSION OF FALSE "Whois" INFORMATION

SIIA appreciates the approach taken by the FTC to confirm an interpretation of the Act that is useful in combating misleading or inaccurate "Whois" information.[58] In the Notice, the FTC – correctly, in our view – states its view that registering a domain name with false or misleading information is already prohibited under Section 15 U.S.C. 7704(a)(1)(A) of the Act. That section prohibits initiation of any email message that includes an originating email address or a domain name that "was obtained by means of false or fraudulent pretenses or representations".[59]

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[57] Ibid. See proposed CAN-SPAM Rule 16 C.F.R. 316.5.

[58] "Whois" is an Internet program that allows users to query a database of people and other Internet entities, such as domains, networks, and hosts. "Whois" databases are maintained generally by the registrars. "Whois" data includes the registrant's company name, address, phone number, and email address. It is used by SIIA and many of our members to track down individuals or entities that may be engaging in fraudulent behavior or infringing members' works.

[59] The Notice cites FTC v. Global Net Solutions, Inc., et al., CV-S-05-0002-PMP (LRL) (D.Nev. filed Jan. 3, 2005) (alleging that, among other things, the defendants violated 15 U.S.C. 7704(a)(1) of CAN-SPAM by initiating commercial email containing an originating email address that was obtained through false representations to the email service provider).

EMAIL MESSAGES FROM AN ASSOCIATION TO ITS MEMBERS

The FTC states its belief that "email messages from an association or other membership entity to its members are likely 'transactional or relationship' in nature, pursuant to section 7702((17)(A)(v)."[60] SIIA concurs with this view. It is consistent with the expectations of members (particularly when membership in an association is by a company and not on an individual basis). Any Association sends a variety of communications (email, phone, mail) to its members on a regular basis. Some may be commercial, some may be non-commercial, and lots may be dual purpose. In all these cases, it is the expectation of members (in our case, which is on a company, and not individual, basis) that a benefit of membership is knowledge about and access to commercial services and products, as well as other information that is consistent with our role of advocating, promoting and protecting the industry. Based on our own experience, attempting to draw these lines in a meaningful and workable way with all staff that send emails has proved overwhelming and challenging. In addition, imposing the requirements of the Act on communications by an Association to its members may conflict with the means and conditions of joining, renewing or not renewing membership. The FTC should avoid overregulation of issues related to membership in an Association, which are rooted in first amendment freedom of association protections, as they may overstep legitimate communications and procedures that are already in place.

As for how "lapsed" members should be treated, SIIA urges the FTC to avoid a *per se* approach since with any lapsed member-email recipient, the FTC's analysis in other areas may be relevant and the Rule should avoid creating unintended consequences by treating this aspect of Association membership separately.

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SIIA appreciates this opportunity to comment on the various issues raised by the FTC under its discretionary rulemaking authority. Please do not hesitate to contact us if we can provide any further information, or answer any questions.

Sincerely,

Mark Bohannon
General Counsel &
Senior Vice President Public Policy

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[60] 70 Fed. Reg. 25426, 25450 (March 12, 2005).